QBE INSURANCE LTD. v. SIM LIM FINANCE LTD.

[C.A. (Wee Chong Jin C.J., Chan Sek Keong J.C. & Rajah J.) January 19, 1987]

[Singapore – Civil Appeal No. 77 of 1985]

Hire Purchase – Goods acquired on hire purchase – Goods insured against fire with appellants/insurance company – Goods damaged by fire – Appellants/insurance company released money to hirer of goods – Claim by finance company/owner of goods against appellants for negligence and conspiracy – Constructive trust reflected in pleading.

Insurance – Goods acquired on hire purchase destroyed by fire – Whether insurance company liable to finance company/owner of goods for releasing sum insured to hirer.

Practice and Procedure – Limitation period – Application to strike out action for want of prosecution within currency of – Whether allowed.

Practice and Procedure – Appeal – Circumstances in which appellate court may interfere.

Practice and Procedure – Pleadings – Court allowing claim based on pleadings although no relief prayed for.

Constructive Trust – Goods acquired on hire purchase destroyed by fire – Goods insured – Whether insurance company liable to finance company/owner of goods for releasing sum insured to hirer.

The plaintiffs/respondents, a finance company, had on December 26, 1978, entered into a hire purchase agreement with a company called Highlight Industry Pte. Ltd. ("Highlight"), the first defendants, by which Highlight agreed to acquire on hire purchase 74 sets of industrial sewing machines and to pay to the plaintiffs/respondents monthly instalments totalling $105,000. On March 24, 1979, the appellants, an insurance company, issued a fire policy in favour of Highlight insuring, *inter alia*, its interest or property in "machinery and utensils" in the sum of $140,000 against loss or damage by fire.

In early July 1975, a fire occurred in the factory of Highlight and all its machinery was destroyed. On being informed of this by Highlight on July 5, 1979, the respondents wrote to Highlight on the same day claiming an interest in the machinery and requesting Highlight to instruct the appellants to pay the proceeds of insurance to the respondents. The letter was carbon-copied to the appellants. The appellants did not acknowledge or reply to this letter. On October 22, 1970, the respondents commenced proceedings in Suit No. 3309 of 1980 claiming against (a) Highlight the sum of $140,000 received by it and damages for conversion and conspiracy; (b) one Tan Kah Hwee, a director of Highlight, as second defendant, the sum of $140,000, received by him, damages for conversion, compensation for breach of fiduciary duty and/or duty of care and for damages for conspiracy; (c) the appellants, as third defendants, damages for negligence and conspiracy.

Thereafter the appellants applied to dismiss the action in Suit No. 3309 of 1980 for want of prosecution (see [1987] 1 M.L.J. 182). The application was dismissed by Lai Kew Chai J. The appellants appealed.

Held, dismissing the appeal: (1) a claim based on constructive trust could be made out on the pleadings although no relief has been prayed for;

(2) the analysis of authorities had shown that this was not a plain case where the claim based on constructive trust would fail *in limine;*

(3) in the circumstances of the case, the contention of counsel that statutory limitation applies to all constructive trusts was too wide. Owing to the nature of the present action, whether or not his claim, if well-founded, would be barred after six years cannot therefore be decided until the nature of the constructive trust, if any, had been determined by the trial judge;

(4) the function of an appellate court in hearing an appeal against an interlocutory order is primarily a reviewing function and the court should reverse a decision only in cases where either (i) it is satisfied that the judge has erred in principle by giving weight to something which he ought not to take into account or by failing to give weight to something which he ought to take into account; (ii) in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations. In the present case the second consideration does not apply and with regard to the first consideration, the court was not satisfied that Lai Kew Chai J. was wrong in dismissing the appellants' application on the alternative ground;

(5) the courts in Singapore, unlike the courts in Malaysia, do not have the benefit of a statutory rule which can be construed to express a policy consideration to permit the courts in Singapore to initiate the steps to strike out actions for want of prosecution or to depart from the principle applied in *Birkett* v. *James*[1] that the power to dismiss an action for want of prosecution, other than in a case of contumelious conduct, should not normally be exercised within the currency of the limitation period. The principle thus formulated requires the courts to strike a balance between the desirability of penalising the plaintiffs (by dismissing his action and costs) and the need to protect the defendant from further or aggravated prejudice in the plaintiff being able to commence proceedings afresh on the same cause of action;

(6) unless compelled by a clear and unambiguous statutory rule which requires the courts in Singapore to give a greater weight to punishing the plaintiff than to protecting the interest of the defendant, the submission of counsel for the appellants (that the action should be dismissed even if all the respondents' causes of action have not been time-barred), if accepted, would amount to an unwarranted extension of the principle in *Birkett* v. *James*.[1]

Cases referred to:

(1) *Birkett* v. *James* [1978] A.C. 297, 317; [1977] 2 All E.R. 801, 804.

(2) *Maurice* v. *Goldsbrough Mort & Co. Ltd.* [1939] A.C. 452.

(3) *Soar* v. *Ashwell* [1893] 2 Q.B. 390.
(4) *Re Robinson* [1911] 1 Ch. 502.
(5) *Allen* v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229.
(6) *Biss* v. *Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 W.L.R. 382.
(7) *Waters* v. *The Monarch Fire and Life Assurance Co.* (1856) 5 E.L. & B.L. 870; 119 E.R. 705.
(8) *London & North Western Ry. Co.* v. *Glyn* (1859) 1 El. & El 652; 120 E.R. 1054.
(9) *John Rigby (Haulage) Ltd.* v. *Reliance Marine Insurance Co. Ltd.* [1956] 2 Q.B. 468.
(10) *Hepburn* v. *A. Tomlinson (Haulers) Ltd.* [1966] A.C. 451.
(11) *Re King* [1963] 1 Ch. 459.
(12) *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70.
(13) *Toh Hock Thye* v. *Toh Chwee Biow* [1982] 1 M.L.J. 152.

COURT OF APPEAL.

Harry Elias for the appellants.

B. Ganesh for the respondents.

Cur. Adv. Vult.

Chan Sek Keong J.C. (delivering the Judgment of the Court): This is an appeal against the order of Lai Kew Chai J. dismissing the appellants' application to dismiss the action in Suit No. 3309 of 1980 for want of prosecution.

The respondents, a finance company, had on December 26, 1978, entered into a hire purchase agreement with a company called Highlight Industry Pte Ltd (formerly known as Highlight Trading Pte Ltd) ("Highlight"), the 1st defendants, by which Highlight agreed to acquire on hire purchase 74 sets of industrial sewing machines and to pay to the respondents monthly instalments totalling $105,000. On March 24, 1979, the appellants, an insurance company, issued a fire policy in favour of Highlight insuring, *inter alia,* its interest or property in "machinery and utensils" in the sum of $140,000 against loss or damage by fire. The policy contained the following condition:

"The above are the property of the Insured or held by them in trust or on commission for which they are responsible, whilst contained in the building built of and roofed with concrete throughout, occupied as GARMENT FACTORY, situate NO. 315, ALEXANDRA ROAD, 2ND FLOOR, SINGAPORE PAPER PRODUCT LIMITED BUILDING, SINGAPORE 3."

In early July 1979 a fire occurred in the factory of Highlight and all its machinery was destroyed. On being informed of this by Highlight on July 5, 1979, the respondents wrote to Highlight on the same day claiming an interest in the machinery and requesting Highlight to instruct the appellants to pay the proceeds of insurance to the respondents. The letter was carbon-copied to the appellants. The appellants did not acknowledge or reply to this letter. On October 22, 1980, the respondents commenced proceedings in Suit No. 3309 of 1980 claiming against.

(a) Highlight, as 1st defendants, the sum of $140,000 received by it and damages for conversion and conspiracy;

(b) one Tan Kah Hwee, a director of Highlight, as 2nd defendant, the sum of $140,000 received by him, damages for conversion, compensation for breach of fiduciary duty and/or duty of care and for damages for conspiracy;

(c) the appellants, as 3rd defendants, damages for negligence and conspiracy.

The conspiracy as described in paragraph 8 of the Statement of Claim and alleged to have been carried out in July 1979 in paragraph 9 thereof was that all the defendants conceived and carried out a fraudulent and dishonest design whereby they and each of them intended that the 1st defendants would gain by (a) the 1st defendants lodging a claim for loss of the machinery by fire; (b) the 3rd defendants processing the claim; (c) the 1st and 3rd defendants would ignore the respondents' interest in the said machinery; (d) the appellants would release at least a sum of $140,000 to the 1st defendants.

Although the respondents did not claim any relief against the appellants as constructive trustees, they have pleaded that the insurance policy was effected by the 1st defendants at their direction as their agents or trustees and Lai Kew Chai J. held that such cause of action had been sufficiently pleaded for the purpose of considering the merits of the appellants' application.

The negligence of the appellants as pleaded in paragraph 15 of the Statement of Claim was alleged to have occurred when they failed to enquire from or inform the respondent about the release of the $140,000 to the 1st defendant and to instruct the 1st and 2nd defendants to forward the sum of $140,000 to the respondents.

On July 25, 1980, the respondent entered judgment against the 1st defendants on their failure to

file their Defence. The 1st defendants were wound up by the Order of Court on July 24, 1981.

The appellants filed a Defence on February 16, 1981, in which they denied all the allegations of conspiracy, breach of trust and negligence made by the respondents against them and averred that in law (a) they were under no duty to the respondents, that the latter did not have at any time an interest in or claim to the $140,000 or any other sum and that, therefore, they were entitled to make payment of the insurance claim to the 1st defendants; and (b) that the allegations of the respondents did not constitute a cause of action nor was it incumbent upon the appellants in law to make any inquiry in regard to the matters contained in such allegations. The appellants also pleaded that the insurance policy was null and void for non-disclosure by the 1st defendants and that, if any money were payable thereunder, it was limited to $44,461.37 after taking into account a claim by way of a set off against the 1st defendants.

After the filing of the Defence, the action went to sleep until April 10, 1985, when the respondents gave notice of their intention to proceed after the expiration of one month thereof. The Summons for Directions was filed on May 13, 1985, and was fixed for hearing on July 29, 1985. On July 2, 1985, the appellants filed an application to dismiss the action for want of prosecution and this application was also fixed for hearing on July 29, 1985. By this time, the respondents had also discontinued their action against the 2nd defendants.

Both applications were adjourned for hearing to August 19, 1985, when Lai Kew Chai J. dismissed the appellants' application with costs and immediately gave the usual directions for trial. Hence this appeal.

Lai Kew Chai J., in his Grounds of Judgment, gave two grounds for dismissing the appellants' application. (1) in their Statement of Claim the respondents had pleaded a cause of action based on fraud and fraudulent breach of trust against the appellants as constructive trustees and that this cause of action had not been barred by limitation, and (2) the flagrant and inordinate delay of the respondents did not give rise to a substantial risk that it would not be possible to have a fair trial of the issues in the action and was not likely to cause serious prejudice to the appellants. As to the law, Lai Kew Chai J. applied, firstly, the general principle laid down by the House of Lords in *Birkett* v. *James*[1] that the power to dismiss an action for want of prosecution in the words of Lord Diplock (at page 805):

> "..... should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

and secondly, the corollary to principle 2(b) that was applied in *Birkett* v. *James*[1] itself, *i.e.* that a court should not normally exercise such power on the ground of inordinate and inexcusable delay (and not contumelious default) where the plaintiff's claim would not be barred by limitation, as to do so in such a case would merely mean that the plaintiff would issue a fresh writ and aggravate the prejudice to the defendant from delay and add to the costs.

Counsel for the appellants sought to attack Lai Kew Chai J.'s decision on the following grounds:

(i) In respect of constructive trust: first, the Judge was wrong in finding that the respondents' pleadings reflected a claim based on constructive trust and that no relief in respect of such claim had been asked for; secondly, on the authority of *Maurice* v. *Goldsbrough Mort Co. Ltd.*,[2] the 1st defendants did not insure the machinery as agents or trustees for the respondents but on account of their own insurable interest therein, that the appellants owed no duty or responsibility to the respondents in respect of such insurance and that therefore the insurance proceeds were not trust moneys of which the appellants had notice or were under any obligation to the respondents; and thirdly, that even if there were a claim based on constructive trust that cause of action would have been time-barred at the date of hearing of the appellants' application, as section 22(1) of the Limitation Act did not exclude a claim based on constructive trust from the limitation period of six years; the authorities for this submission were *Soar* v. *Ashwell*[3] and *Re Robinson*[4].

(ii) In respect of the claims based on conspiracy and negligence, that the said claims were also time-barred and that inordinate and inexcusa-

ble delay on the part of the respondents or their lawyers had given rise to a substantial risk that it was not possible to have a fair trial or was such as was likely to cause or to have caused serious prejudice to the appellants for the following reasons: first, it was extremely difficult to locate the directors and officers of the 1st defendants which had already been compulsorily wound up in September 1979; secondly, the right of indemnity of the appellants against the respondents had been extinguished; thirdly, the claims against the 1st and 2nd defendants had been discontinued; fourthly, the mere lapse of time on issues of fraud, conspiracy and professional negligence could not fail to give rise to a substantial risk that a fair trial of those issues would no longer be possible, citing the *dictum* of Diplock L.J. (as he then was) in *Allen* v. *Sir Alfred McAlpine & Sons Ltd.*[5] at page 265 as follows:

> "But on the issues of fraud, conspiracy and professional negligence, the lapse of time cannot fail to give rise to a substantial risk that a fair trial of these issues will be no longer possible."

Fifthy, there was much prejudice to a defendant in having an action hanging over his head, citing the *dictum* of Lord Denning in *Biss* v. *Lambeth, Southwark and Lewisham Area Health Authority (Teaching)*[6] at page 383 as follows:

> "Prejudice to a defendant by a plaintiff's delay is not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a defendant in having an action hanging over his head indefinitely."

Sixthly, an inference of serious prejudice may properly be drawn from the delay itself – citing the *dictum* of Salmon L.J. (as he then was) in *McAlpine's* case at page 268 as follows:

> "(3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelikhood of serious prejudice at the trial."

With regard to the first ground of appeal, we agree with the view of Lai Kew Chai J. that a claim based on constructive trust could be made out on the pleadings although no relief has been prayed for. As to the argument that *Goldsbrough's* case has precluded the existence of such a trust, we need to examine the Privy Council's decision carefully. In *Goldsbrough's* case, wool brokers had insured "merchandise the assureds' own property or held by them in trust or on commission for which they may be liable in the event of loss, damage by fire," but "not including profit of any land." The brokers had in their possession for sale wool consigned to them by the owner thereof. The wool was destroyed by fire. The brokers collected the full value of the wool from the insurers and paid the balance of the proceeds to the owner after deducting certain claims, one of which was for commission which they would have earned but for the fire. The owner disputed, *inter alia,* this item on the ground that such commission was a profit excluded from the fire policy and brought an action against the broker for money had and received. The brokers did not dispute the right of the owner to claim from them an account of the moneys collected under the policy. The dispute was as to what share of these moneys the brokers were entitled to retain. The Privy Council, after considering the nature of the policy, held that the brokers had insured the wool on account of their own insurable interest therein "which arose from their liability to the owner in case of loss" and that they had not done so as agents for the owners. The Privy Council also held that the terms of the policy insured the wool "so far as it is the assureds' property, that is to the extent of their lien or special property, and as the residue refers to the property as held on trust" (at page 464) and that "the rights in these moneys are apportionable according to the respective interests or the property rights in the goods themselves" (at page 464).

In the course of their judgment, the Privy Council referred to *Waters* v. *the Monarch Fire and Life Assurance Co.*[7] and *London & North Western Ry. Co.* v. *Glyn,*[8] certain decisions which were relevant to the issue of constructive trust. In *Water's* case, the plaintiffs, who were warehousemen, insured with the defendants against loss or damage by fire "goods in trust or on commission therein." The Court, (consisting of Lord Campbell C.J., Wightman J. and Crompton J.), held that goods deposited by customers with the plaintiffs in the course of their business were held in trust and were covered by the policy. Lord Campbell C.J. at page 709 said:

> "What is meant in those policies by the words 'goods in trust.' I think that means goods with which the assured were entrusted; not goods held in trust in the technical sense, so that there was only an equitable obligation on the assured enforceable by a subpoena in Chancery, but goods with which they were entrusted in the ordinary sense of the word ... The last point that arises is, to what extent

does the policy protect those goods. The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good 'all such damage and loss as may happen by fire to the property hereinbefore mentioned.' That is a valid contract; and, as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest. The authorities are clear that an assurance made without orders may be ratified by the owners of the property, and then the assurers become trustees for them."

In *Glyn's* case, where the principle in *Water's* case was applied, the plaintiffs, who were common carriers, insured against fire their own goods and goods held in trust as carriers in a certain warehouse. The policy contained a condition indorsed therein that goods held in trust, or on commission, were to be insured as such, otherwise the policy would not extend to cover such property. The Court (consisting of Wightman J., Erle J., Crompton J. and Hill J.) held that the whole value of the goods in the warehouse in the plaintiff's possession as carriers was insured by it and not merely their interest as carriers in such goods, that they were entitled to recover the whole value of such goods destroyed by fire in the warehouse and that further the plaintiffs would be trustees for the owners of the goods of the amount thus recovered, less the plaintiff's charges as carriers in respect of the goods.

In his judgment, Wightman J. (at page 1058) said:

"Now, when the terms of the policy are looked at, it appears that the plaintiffs thereby insure 'goods their own and in trust as carriers' in the warehouse. Thus a distinction is drawn between their own goods and goods which, as carriers, they hold for other people; and it appears to me that both classes of goods were meant to be fully covered by the insurance, and that the description of some of the goods as 'goods in trust as carriers' was inserted, in compliance with the second condition indorsed on the policy, for the express purpose of protecting the interest of the owners of such goods, as well as the more limited interest of the plaintiffs. It is true that this insurance is in the nature of a voluntary trust undertaken by the plaintiffs, without the knowledge of the cestuis que trust, the owners of the goods: but it is a trust clearly binding on the plaintiffs in equity, who will hold the amount which they now recover, in the first place for the satisfaction of their own claims, and in the next, as to the residue, in trust for the owners."

Crompton J. also delivered a judgment in which he said (at page 1059):

"The plaintiffs intended to insure, first, their own interest, if any, in the goods; and, secondly, the interest of their cestuis que trust, the owners of the goods. Mr. Lloyd said that the questions were, Who are the assured? and What is their loss? I answer, first, the assured are the plaintiffs, both as trustees and as carriers; secondly, the loss is the loss of the property as trust property; that is to say as property in which the plaintiffs are beneficially interested to the extent of their lien, and as to the residue of which they are trustees for the true owners. I should come to no other conclusion if the question was res integra; but it is not, having already been decided in *Waters* v. *The Monarch Insurance Company*) ... There can be no objection to the plaintiffs recovering the full value of the goods: for an equity will arise, in favour of the owners, from the mere circumstance that the plaintiffs will have received more than enough to cover their own interest: as to the excess above the sum which will cover that interest, the plaintiffs will be compellable, in equity, to pay it over to the owners."

In more recent times, the decision in *Water's* case has been followed in *John Rigby (Haulage) Ltd.* v. *Reliance Marine Insurance Co. Ltd.*[9] and extended by the House of Lords in *Hepburn* v. *A. Tomlinson (Hauliers) Ltd.*[10] and distinguished in *Re King.*[11] (which concerned a fire policy taken out by a tenant in respect of the landlord's premises). In *John Rigby's* case, the Court of Appeal held that the words "in trust" in a policy of insurance indemnifying the insured against loss of or damage to goods belonging to or held in trust by the insured did not mean that the goods were held by the insured under some form of legal trust; nor was the expression limited to cases in which the insured had come into physical possession of the goods and that the words "in trust" meant "entrust" and covered the handing over of goods at the insured's request to a person designated by him.

In *Hepburn* v. *A. Tomlinson (Hauliers) Ltd.*[10] the respondents, who were carriers, insured "tobacco manufactured goods and/or machinery" "whilst being carried or in transit." There was no condition in the policy referring to goods held "in trust." It was not disputed that the policy was taken out by the respondents on the instruction of and by way of fulfilment of their obligations to the third party under the agreement for carriage of the goods. A quantity of cigarettes belonging to a third party was carried by the respondents in lorries hired to the third party, the respondents supplying the drivers, and taken to the third party's warehouse. The goods were not unloaded but left in the charge of the third party's night watchman. The goods were stolen during the night without any negligence on the part of the respondents. The House of Lords held that the respondents were entitled to recover the full value of the ciga-

rettes under the policy. Lord Reid in his judgment said (at page 467) said:

"A bailee can if he chooses merely insure to cover his own loss or personal liability to the owner of the goods either at common law or under contract and if he does that of course he can recover no more under the policy than sufficient to make good his own personal loss or liability. But equally he can if he chooses insure up to his full insurable interest – up to the full value of the goods entrusted to him. And if he does that he can recover the value of the goods though he has suffered no personal loss at all. But in that case the law will require him to account to the owner of the goods who has suffered the loss or, as Lord Campbell says, he will be trustee for the owners. I need not consider whether this is a trust in the strict sense or precisely on what ground the owner can sue the bailee for the money which he has recovered from the insurer." (at page 467).

"No doubt the principle preventing jus quaesitum tertio has been firmly established for at least half a century. But it does not appear to me to be a primeval or necessary principle of the law of England. We must uphold it until it is altered. But I do not think that we are bound to be astute to extend it on a logical basis so as to cut down an exception, if it be an exception, which has stood unchallenged since the decision of *Waters* case more than a century ago." (at pages 470-471).

Lord Pearce in his judgment said (at page 480):

"The bailee of goods, however, is in a very different position. He has a right to sue for conversion, holding in trust for the owner such of the damages as represent the owner's interest. He may likewise sue in negligence for the full value of the goods, though he would have had a good answer to an action by the bailor for the loss of the goods bailed *(The Winkfield)*."

"It would seem irrational, therefore, if he could not also insure for their full value. Both those who have the legal title and those who have a right to possession have an insurable interest in the real or personal property in question. There seems, therefore, no reason in principle why they should not be entitled to insure for the whole value and recover it. They must, however (like plaintiffs in actions of trover or negligence), hold in trust for the other parties interested so much of the moneys recovered as is attributable to the other interests. But is proof of an intention to insure for the interests of others a necessary condition precedent for a plaintiff seeking to recover on an insurance policy in such circumstances? I do not think so."

The line of authorities beginning with *Water's* case down to *Hepburn's* case has established the principle that where a bailee of goods insures such goods against damage by fire, he is entitled, *vis-a-vis* the insurers, to recover their full insurable value but that *vis-a-vis* the owner thereof, he is accountable to the owner for the balance of the insurance proceeds after deducting his claims thereto. This accountability was in *Goldsbrough's* case enforced by the owner in an action for money had and received but *dicta* in all the authorities referred to above suggested that it could be enforceable by the owner in equity (*e.g.* (i) Campbell C.J. in *Water's* case even though the goods were said not to have been held in trust in the technical sense; (ii) in *Glyn's* case, where the plaintiff had expressly insured the goods as trustee, but without the knowledge of the owner and (iii) in *Hepburn's* case, although Lord Reid declined to pronounce on the nature of this "trust," Lord Pearce, in the same case, accepted the terminology of "trust" to describe this accountability). All the said decisions involved claims by the bailees against the insurers (except *Goldsbrough's* case which was a claim by the owner against the bailee but *after* the insurance moneys had been paid to the bailee). No authority has been cited to us which concerns a claim by the owner against the insurers under a fire policy of this nature. But the *dicta* in the authorities have consistently referred to the insured bailee holding the insurance moneys in trust for the owner even though the precise nature of this trust has yet to be identified. It may be argued that if the insurance moneys belong, in equity, to the owner of the goods when in the hands of the insured bailee, there is no reason why, in principle, the same moneys should not belong to the owner when they become payable or have been appropriated against a fund from which such payment can be made, whilst in the hands of the insurers; and if so, the owner should be entitled to claim these moneys from the insurers before they are paid; and if the owner is so entitled, it may be argued that the insurers should be liable as constructive trustees should they, after receiving notice of a conflicting claim by the owner, pay the moneys (and thereby assisting in their wrongful disposal) to the insured bailee.

Indeed in *Re King*, Upjohn L.J. (at page 491) summarised the effect of *Water's* case and *Glyn's* case as follows:

"Those cases establish that where a warehouseman (without the consent, or even knowledge, of the owners) insures the whole value of the goods in his warehouse, although his only interest in those goods is his lien for warehouse charges and so forth, the *owners of the goods, which have been destroyed by some accidental fire, are entitled to claim against the insurers for the value of the goods. This is ancient mercantile law. The warehouseman is presumed to be insuring the respective interests of himself and the owners in the goods and each may claim according to his interest.*" [italics for emphasis]

All the relevant authorities where the trust terminology was used concerned warehousemen and

carriers. The present action concerns a hirer who has possession of the goods under a hire purchase agreement. Whether or not this distinction displaces the application of the trust principle is an issue which was not argued before us.

The respondents have another string to their bow. They have pleaded that the 1st defendants had insured the sewing machines as their trustees, which was permitted by the condition of the policy. This is an issue of fact which has to be decided on the evidence. The form of the policy does not preclude this factual situation. If the 1st defendants did insure the sewing machines as trustees for the respondents, there might be an argument that the respondents adopted or ratified such insurance by claiming against the appellants directly. In *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*[12] at page 79, the Privy Council stated the principle as follows:

> "..... a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant."

Our analysis of the authorities has shown that this was not a plain case where the claim based on constructive trust would fail *in limine*. In our view, counsel for the appellants has not adequately addressed this issue and the other issues discussed above either in terms of principle or authority. They merit full argument before the trial judge. For this reason and for the reason that this appeal would in any case have failed on another ground, we found it unnecessary to decide the issue of the appellants' liability as constructive trustee.

The next submission of counsel for the appellants was that any claim based on constructive trust would have been barred after six years on the ground that section 22(1) of the Limitation Act (Cap. 10) had no application to constructive trusts: he cited *Soar* v. *Ashwell*[3] and *Re Robinson*.[4] We do not think that this contention is supported by these authorities. In *Soar* v. *Ashwell*,[3] the majority (Lord Esher M.R. and Bowen L.J.) of the Court of Appeal held that on the facts the defendant, a solicitor, had received moneys from certain trustees, his clients, in a fiduciary position and was therefore accountable to the surviving trustee as having been in the position of an express trustee and for that reason, the Statute of Limitation was not applicable to such a claim. Kay L.J. held that the defendant was liable because he, though a stranger to the trust, had assumed to act and had acted as a trustee and had received trust money under a breach of trust in which he concurred. Counsel for the appellants in this appeal, in support of his contention, relied on a passage in the judgment of Bowen L.J. (at pages 395-396) where his Lordship drew a distinction between an express trust (*i.e.* "one which arises between the *cestui que trust* and his trustee") and a constructive trust (*i.e.* "one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour") and that "time is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust, is a doctrine which has been clearly and long established." In our view, counsel's argument was based on a partial reading of Bowen L.J.'s judgment. His Lordship (at page 396) recognised and drew attention to the "variety and inconsistency both in the language used about constructive trusts and in the line of demarcation that has been drawn between the cases of express and constructive trusts," and then went on to refer to four such instances:

> "Firstly, the doctrine that time is no bar in the case of express trusts has been extended to cases where a person who is not a direct trustee nevertheless assumes to act as a trustee under the trust: *Life Association of Scotland* v. *Siddal* 3 D.F. & J.58. This extension of the doctrine is based on the obvious view that a man who assumes without excuse to be a trustee ought not to be in a better position than if he were what he pretends. Secondly, the rule as to limitations of time which has been laid down in reference to express trusts has also been thought appropriate to cases where a stranger participates in the fraud of a trustee: *Barnes* v. *Addy* L.R. 9 Ch. 244. Thirdly, a similar extension of the doctrine has been acted on in a case where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant: *Lee* v. *Sankey* L.R. 15 Eq. 204. Fourthly, in some other cases, *e.g.*, in *Bridgman* v. *Gill* 24 Beav. 302, by Lord Romilly, and in *Wilson* v. *Moore* 1 M.&K. 337, by Lord Brougham, language has been employed in regard to the question of limitations of time in certain instances of constructive trust which can scarcely be reconciled with the language held in *Bonney* v. *Ridgard* 1 Cox, 145; *Beckford* v. *Wade* 17 Ves. 87; *Townshend* v. *Townshend* 1 Bro. C.C. 550, and in other cases."

Kay L.J. in his judgment (at page 405) said:

> "The result seems to be that there are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of Limitations cannot be set up as a defence. Amongst these are the case where a stranger to the trust has assumed to act and has acted as a trustee, and the case where a stranger has concurred with the trustee in commit-

ing a breach of trust, and has taken possession of the trust property, knowing that it was trust property, and has not duly discharged himself of it by handing it over to the proper trustees or to the persons absolutely entitled to it."

In *Re Robinson*,[4] a trustee had overpaid one beneficiary by mistake. The other beneficiary sued the overpaid beneficiary and the Court held that the claim was not one based on constructive trust but was in the nature of a common law action for money had and received and was barred after six years. Warrington J. (at page 506) interrupted counsel's submission that the Statute of Limitations applied to express trustees only, and said:

"I do not think you will find that there is a distinction between express and constructive trustees as regards the applicability of the Statute of Limitations."

Indeed in his judgment, Warrington J. (at page 513) referred to three classes of cases where the limitation period would not apply and two of them which were cases of constructive trusts.

In the circumstances, counsel's contention that statutory limitation applies to all constructive trusts was again too wide. In the present action, the claim based on constructive trust, although not fully or well pleaded, appeared to have been founded on either of (1) the 1st defendants having taken the policy out as agent or trustee of the respondents and (2) when the insurance proceeds became payable or were received by the 1st defendants, the proceeds were subject to a trust in favour of the respondents, and the appellants, having been thus informed, paid the moneys to the 1st defendants Whether or not this claim, if well-founded, would be barred after six years cannot therefore be decided until the nature of the constructive trust, if any, has been determined by the trial judge.

In connection with the said submission, counsel for the appellants also contended that where the plaintiff would be barred by limitation from commencing fresh proceedings if his existing action were dismissed for want of prosecution, the court should, as a matter of course, dismiss it without regard to whether or not the defendant would be seriously prejudiced by the delay or there would be a substantial risk that a fair trial would not be possible. We do not agree. There is no authority for this proposition. In *Birkett* v. *James*,[1] the House of Lords decided that a court should not normally dismiss an action for want of prosecution where a fresh action could immediately be filed, but not that it should as a matter of course dismiss such action where a fresh action could not be filed. In such a case, the question of serious prejudice to the defendant or the risk that he would not be able to get a fair trial must still be inquired into. This was precisely what Lai Kew Chai J. did in his alternative ground.

The learned Judge took the view that there was no likelihood of the appellants being seriously prejudiced or of a fair trial not being possible, as their defence could be made out largely by documentary evidence. Lai Kew Chai J. also dealt with and rejected the submission that the appellants had been prejudiced by the loss of the right of contribution or indemnity from the 1st defendants on the ground that it was the appellants' own delay which had resulted in this loss, if any. In this respect, we would add that as the 1st defendants were wound up by the court as early as on July 24, 1981, any such loss of contribution had occurred long before the appellants' application and had no relation to the delay of the respondents in prosecuting this action.

As to the other submissions founded on the observations of Diplock L.J., Salmon L.J. and Lord Denning referred to above, we are of the view that they must be read in their respective contexts. Their Lordships did not intend to lay down a general principle that where a claim is based on fraud, conspiracy or negligence, inordinate and inexcusable delay would, *ipso facto*, cause serious prejudice to the defendant or give rise to a substantial risk that a fair trial on those issues would not be possible. Each case must depend on its own facts and the issues involved, including the nature of the defence.

In regard to the decision of Lai Kew Chai J., the principles which guide an appellate court in determining an appeal therefrom is clear. The function of an appellate court in hearing an appeal against an interlocutory order is primarily a reviewing function and the court should reverse a decision only in cases where either (i) it is satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account; or (ii) in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations [see Lord Diplock in *Birkett* v. *James* (at page 317)]. The second consideration

does not apply here. In respect of the first consideration, we were not satisfied that Lai Kew Chai J. was wrong in dismissing the appellants' application on the alternative ground. On the contrary, we were satisfied that his decision could have been supported on another ground. As summarised earlier, the appellants denied liability on the ground that they had not been guilty of fraud, conspiracy or negligence in paying the insurance claim to the 1st defendants because under the terms of the policy they owed no duty whatever to the respondents. Further, they have also contended that the condition in the policy did not have the effect of creating any trust of the insurance proceeds in favour of the respondents. In substance, the defence of the appellants was substantially one of law. We are not persuaded that a defence of law would be prejudiced, much less seriously prejudiced, or would render a fair trial impossible by delay.

Finally, it is necessary for us to consider one other submission of counsel for the appellants. It was strenuously put to us that the action should be dismissed even if all the respondents' causes of action have not been time-barred. This point was not argued before Lai Kew Chai J. but it was made to us on the basis of the decision of the Federal Court of Malaysia in *Toh Hock Thye* v. *Toh Chwee Biow*.[13] In that case, the appellants had on February 22, 1975, commenced an action against the respondent for fraudulent breach of trust in the management of trust property during the period October 2, 1951, to June 1973. The respondent filed his defence on May 5, 1975, in which he admitted the trusteeship but denied the breach of trust. The proceedings remained in abeyance until August 26, 1980, when the Senior Assistant Registrar of the High Court, acting under Order 34, rule 8(2) of the Rules of the High Court, 1980, issued a notice to the parties and their solicitors to attend (which they subsequently did) the Judge's Chambers on October 5, 1980, for the appellants to show cause why the said suit should not be struck out for want of prosecution. Order 34 rule 8 reads as follows:

"(1) If any cause or matter where a notice of trial is required the plaintiff does not within six weeks after the time when he first becomes entitled to give notice of trial under rule 7 of this Order or within such extended time as the Court or a Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or Judge may seem just.

(2) If no notice of trial is given or if the defendant makes no application to dismiss the action under sub-rule (1), the Court or Judge may after giving such notice as may be necessary dismiss the cause or matter or may make such order and on such terms as to costs or otherwise as to the Court or Judge may seem just."

At the hearing, no affidavit had been filed by the appellants to show cause, and their counsel, who was standing in for another counsel, asked for an adjournment to enable that other counsel to argue the case. On resumption of hearing, the same counsel appeared for the respondents but not the counsel having the conduct of the matter. No further argument seemed to have taken place and the action was struck out by the judge. The Federal Court dismissed the appeal of the appellants. Salleh Abas F.J. (as he then was) delivered the judgment of the Court in which the following grounds were given: first, that the delay of 5 years and 3 months after the commencement of proceedings was not short and that the totality of the delay from the commencement of the cause of action, 28 years 10 months and 24 days was just too long and that the respondents had been prejudiced by it; secondly, that the conduct of the appellants' counsel (in failing to appear to argue the matter after the adjournment) was an intentional and contumelious action disrespectful to the court; and thirdly, even though that the action for fraudulent breach of trust was not subject to any statutory limitation, and even assuming that it could not be defeated by the defence of acquiescence, laches or otherwise in equity, the court was justified in dismissing the action for the following reasons (at page 154):

"It will be preposterous to allow this suit to be kept alive on this basis that the appellants have right to keep the respondent waiting for so long as they like just because the substantive cause of their actions is not subject to statutory period of limitation. In our view to do so it will frustrate the amendment made to our procedural rules on November 12, 1976 which enables the court to wake up sleeping litigants."

It would appear to us that the decision of the Federal Court was founded upon the Court's view as to the purpose or policy of Order 34 rule 8(2), *i.e.* the amendment referred to. The amendment was construed to contain a policy consideration that the High Courts in Malaysia should, as a general rule, dismiss actions for want of prosecution whether or not the defendants would be seriously prejudiced or whether or not a fair trial was possible as a result of inordinate and inexcusable delay on the part of the plaintiffs. This view

was forcefully expressed in another part of the judgment of the Court (at page 153) in these words:

"Surely this case reflects the dilatory nature of judicial proceedings held under procedural rules adopted in an adversary system in which the court is expected to stand aloof like the Greek God, Zeus, who sitting on the height of Mount Olympus, and only peering down from that summit upon the doings and misdoings of his subjects below will not act unless moved by them. If accumulation of cases is regarded as valid criticisms and an anathema against the administration of justice in this country, and we heard these criticisms repeated time and time again not only by judges and lawyers but also by laymen such as politicians and businessmen and other concerned citizens, surely one of the key solutions to this problem is to give power to the court to intervene in appropriate cases, when situations call for intervention without having to wait to be moved by the parties. The court should be more active than it has been hitherto. Although the rules laid down elaborate time table for the parties to follow but if the plaintiff does not adhere to it and the defendant is shy or on account of respect for the plaintiff or for any other reason is reluctant to take up the step provided by the rules, the suit is simply pushed into further slumber, and perhaps into deep coma from which it could never regain consciousness and yet for statistical purposes it adds to the backlog of cases giving the court a bad name as being an indolent lot. Public interest therefore demands that the court should have the power to wake such sleeping cases and deal with them appropriately according to justice."

Counsel for the appellants urged this Court to follow the decision of the Federal Court in *Toh Hock Thye's* case as the same policy considerations apply to Singapore. We have deliberated on this decision but it is with some regret that in this particular aspect of the law, we are of the view that the courts in Singapore, unlike the courts in Malaysia, do not have the benefit of a statutory rule which can be construed to express a policy consideration to permit the Courts in Singapore to initiate the steps to strike out actions for want of prosecution or to depart from the principle applied in *Birkett* v. *James*[1] that the power to dismiss an action for want of prosecution, other than in a case of contumelious conduct, should not normally be exercised within the currency of the limitation period. The principle thus formulated requires the courts to strike a balance between the desirability of penalising the plaintiffs (by dismissing his action with costs) and the need to protect the defendant from further or aggravated prejudice in the plaintiff being able to commence proceedings afresh on the same cause of action. Therefore, unless compelled by a clear and unambiguous statutory rule which requires the courts in Singapore to give a greater weight to punishing the plaintiff than to protecting the interest of the defendant, the submission of counsel for the appellants, if accepted on the ground advanced by him, would, in our view, amount to an unwarranted extension of the principle in *Birkett* v. *James*. Save for this submission, counsel made no attempt to argue that there were exceptional circumstances in this action which would take it out of the general principle.

We accordingly dismissed this appeal with costs at the conclusion of the hearing before us.

Appeal dismissed.

Solicitors: *Lim Ganesh & Liu; Drew & Napier.*

WEE MING CHOO v. WONG YIP CHONG

[A.C.J. (Chan Sek Keong J.C.) March 30, 1987]

[Singapore – Suit No. 2265 of 1986]

Vendor and Purchaser – Conditional contract – Sale subject to satisfactory replies to legal requisitions – Retaining wall not approved by competent authority – Subsequent approval of retaining wall – Vendor re-selling property after 21 days' notice – Damages – Duty to mitigate – Law Society's Conditions of Sale 1981, condition 29(4).

Contract – Option to purchase property free from encumbrances – Sale subject to satisfactory replies to requisitions – Delay in completion – Claim for loss against purchaser – Law Society's Conditions of Sale 1981.

Conveyancing – Rights and duties of vendor when reselling property to third party.

In June 1984 the plaintiff entered into a contract to sell a property to the defendant at the price of $850,000.00. The sale was subject to (a) the purchaser's solicitors receiving satisfactory replies to their legal requisitions to the Government Departments, and (b) the Law Society's Conditions of Sale 1981. Completion of the sale was to take place on October 10, 1984. However on August 20, 1984, the defendant's solicitors wrote to the plaintiff's solicitors about certain aspects of the replies to their legal requisitions which were unsatisfactory. This concerned a retaining wall at the rear of the property. Then followed prolonged negotiations. Finally on February 6, 1985, the plaintiff's solicitors issued a notice requiring the defendant to complete within 21 days of the notice. The defendant failed to complete whereupon the plaintiff resold the property after expiry of the notice to another purchaser for $550,000.00.

On March 11, 1986, the plaintiff commenced an action for the difference in purchase price, agent's commission and solicitors' costs. Judgment was given for the plaintiff for damages to be assessed and costs. The defendant appealed.